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Supreme Court of the United States

OCTOBER TERM 1957

No. 350

PASQUALE PALERMO,

Petitioner,

—against—

LUCKENBACH STEAMSHIP COMPANY, INC.,

Respondent.

PETITIONER'S REPLY BRIEF

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Respondent's brief emphasizes the extreme departure of the majority opinion below from accepted principles of maritime tort law. To allow this decision to stand would constitute an abrogation of all decisions emanating from this Honorable Court that hold a longshoreman injured aboard a vessel by reason of the shipowner's breach of its non-delegable obligation of seaworthiness is entitled to the same measure of recovery as any member of the ship's service.

Unseaworthiness of the passageway involved and its causal relationship to petitioner's grievous injuries are admitted in the majority opinion below and in respondent's brief. The fulcrum of the reversal was the trial Judge's refusal to charge a request that admitted this unseaworthiness. What he did charge on this issue was eminently fair to respondent (p. 7a of defendant's appendix to brief below).

Respondent's brief mis-states the issue, finds support for the erroneous decision below in repudiated cases predicated on assumption of risk, clearly not in point, seeks to revise the law by contending that a longshoreman injured aboard a vessel moored to a dock is not entitled to the Federal Maritime Law as would a seaman, and finally, misquotes the trial Judge as stating he was "powerless" on refusing to set the verdict aside.

The sole issue is predicated on the trial Judge's refusal to charge that a passageway used by petitioner, concededly unseaworthy and unsafe, cannot be the basis of recovery if there was a safe alternate route on the opposite side of the vessel. To justify the decision below that reversed on the trial Judge's refusal to instruct the jury on this patently erroneous request, respondent realizes that the petitioner's status as a longshoreman must necessarily be deprecated and unfavorably compared to that of a seaman. On page 4 of its brief in opposition to the petition, respondent writes:

> "Although petitioner was a longshoreman, and in that sense a seaman and a beneficiary of a warranty of seaworthiness, only the ordinary principles of negligence apply to him. The Jones Act—F.E.L.A. 'even the slightest' rule does not apply because he does not meet the statutory condition that he be an employee of respondent."

There is pregnant in this quotation that the "ordinary" principles of negligence, i.e., assumption of risk, contributory negligence as a complete bar, and the fellow servant rule must apply against a longshoreman whether his action be for negligence or unseaworthiness. If this strange proposition was meant to apply to maritime negligence solely, then its argument as to "ordinary principles of negligence" would have no bearing as the instant case was

predicated on alternative grounds of unseaworthiness and negligence, and the issue herein is concerned with *admitted* unseaworthiness. Even as to maritime negligence the harsh common law principles which are repudiated by the Jones Act (46 U. S. C. 688) are likewise inapplicable to a longshoreman. The premise in respondent's extraordinary argument that the principles of Federal Maritime Law should not apply to a longshoreman is that he is not akin to a seaman because he does not fall within the provisions of the Jones Act. This *non sequitur* underlies the error of the majority opinion below that discussed and applied assumption of risk, obviously so despite the denial that its decision was thereby motivated.

That petitioner could not sue under the Jones Act is no basis for denying him his rights as a seaman *pro hac vice*, above and beyond the harsh common law defenses of "ordinary" negligence, has been stated time and again by this Learned Court. In *International Stevedoring Co.* v. *Haverty*, 272 U. S. 50, 47 S. Ct. 19, this Court held longshoremen were "Jones Act" seaman. The subsequent passage of the Longshoremen's and Harbor Workers' Act, 33 U. S. C. 901, *et seq.* precluded a direct action by an injured longshoreman against his employer, but did not deny his third party rights against a shipowner. Sec. 33(a) of the Act, 44 Stat. 1440, 33 U. S. C. 933(a). In maritime negligence, therefore, the substance of the Jones Act is apposite to a longshoreman's rights, and the advanced principles of maritime tort law as to a crew member do equally favor a longshoreman.

This Court in *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, 101, 66 S. Ct. 872 concisely answered respondent's argument by holding that the Longshoremen's and Harbor Workers' Act did not limit any of the rights a longshoreman has against a shipowner, and on page 100 also stated:

> "Nor does it follow from the fact that the stevedore gains protections against his employer appropriate to the employment relation as such, that he loses or never acquires against the shipowner the protections, not peculiar to that relation, which the law imposes as incidental to the performance of that service."

The rationale of giving Jones Act rights to a longshoreman against a third party shipowner, though not available against his employer, was expressed on page 97 of *Sieracki, supra,* citing the lower Court opinion with approval, as follows:

> "It seems, therefore, that when a man is performing a function essential to maritime service on board a ship the fortuitous circumstances of his employment by the shipowner or a stevedoring contractor should not determine the measure of his rights. This is the very basis on which the Jones Act was held applicable to give redress to an injured stevedore in International Stevedoring Co. v. Haverty. * * *"

As to whether there is any difference in applying the warranty of seaworthiness when the vessel is tied to a dock and not at sea, this Court in *Sieracki, supra,* p. 90, held as follows:

> "And the liability applies as well when the ship is moored at a dock as when it is at sea (cases cited)."

In *Pope & Talbot* v. *Hawn,* 346 U. S. 406, 413, 74 S. Ct. 202, 207, the language of the majority opinion that "all were subjected to the same danger. All were entitled to like treatment under law.", must mean that all ship workers, be they carpenters, longshoremen or members of the crew who are exposed to shipboard hazards as a consequence of

their employment, are within the class excluded from the harsh common law principles of "ordinary" negligence.

After carefully reading the cases cited by respondent in support of its proposition as to an alternative passageway and assumption of risk applicable to a longshoreman as a complete bar, we are of the same opinion as Chief Judge Clark who dissented in the instant case and commented that the authorities cited were not in point. These cases cited by respondent either antedate the 1946 *Sieracki* case, *supra*, without any consideration of the warranty of seaworthiness, or concern themselves with alternate routes from which the user was warned away, or where there was no issue of fact as to the availability of a safer, shorter and direct alternate route. The jury herein was charged on respondent's contention as to the "safe" alternate route, and this conflict was resolved properly (p. 7a of defendant's appendix below).

The record also clearly shows that the trial Judge did not consider himself "powerless" to set the verdict aside, but held he was constrained to allow it to stand because "The plaintiff proved facts which the jury was warranted in believing established defendant's liability," and "the federal authorities are practically uniform in holding that a judge should be most scrupulous in granting a motion to set aside a verdict on the ground of excessiveness unless it can be demonstrated that there was no substantial evidence to support the verdict" (p. 12a of defendant's appendix below).

Equally unpersuasive is respondent's argument on excessiveness, not considered by the majority opinion below, though it did observe that petitioner sustained "severe and disabling injuries to his elbow and right arm * * *" (p. 21 of petition). That this is not a real issue is apparent from respondent's decision at the time of trial not to call a

doctor to dispute the unquestioned totally and permanently disabling injuries herein.

A further compelling reason for granting a writ of certiorari to the Court of Appeals for the Second Circuit is the concern expressed by Chief Judge Clark that this case represents the "growing tendency in this court to upset awards in jury cases" and additionally, adds "new curiosities" to the maritime law. Implicit in the Chief Judge's dissent is his request that this Honorable Court grant certiorari in the exercise of its function to supervise and set aright what is tantamount to plain error.

The contention that the trial Judge considered himself "powerless" and the question of excessiveness are specious and extraneous to the final determination sought herein. Summary reversal to the end of a final determination is respectfully urged inasmuch as the majority decision below, pre-empting the proper function of a jury and predicated on rejected principles of law, is so clearly erroneous as to make argument before the Court a waste of time. See: *Securities & Exchange Commission* v. *Otis & Co.*, 338 U. S. 843.

Respectfully submitted,

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